

FIRST DIVISION

July 23, 2012

No. 1-10-2559

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
 APPELLATE COURT OF ILLINOIS
 FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	09 CR 9895
)	
CHRISTOPHER BALODIMAS,)	Honorable
)	Thomas P. Fecarotta, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
JUSTICES Karnezis and Rochford concurred in the judgment.

ORDER

HELD: The evidence was sufficient to prove defendant guilty of criminal sexual assault under section 12-13(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-13(a)(2) (West 2008)). The State established the *corpus delicti* of the crime of criminal sexual assault. And the Illinois Department of Corrections (IDOC) did not exceed its authority and improperly sentence defendant to an indeterminate term of mandatory supervised release (MSR).

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Defendant Christopher Balodimas was accused of having sexual relations with N.T., a 16-year-old girl who had been rendered unconscious or semi-conscious after consuming a large quantity of alcohol. Following a bench trial, defendant was convicted of two counts of criminal sexual assault.

Defendant was convicted of criminal sexual assault under section 12-13(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-13(a)(2) (West 2008)), for committing an act of sexual penetration with a person whom he knew was unable to give knowing consent to such an act. He was also convicted of criminal sexual assault under section 12-13(a)(1) of the Code, for committing an act of sexual penetration with a person by the use of force or threat of force. 720 ILCS 5/12-13(a)(1) (West 2008).

The two counts merged and defendant was sentenced to six years' imprisonment, with 447 days of credit for time served. Defendant was also ordered to submit to deoxyribonucleic acid (DNA) testing and to pay all mandatory fees and fines. For the reasons that follow, we affirm.

BACKGROUND

The State presented evidence that just prior to the incident, N.T. had one of her girlfriends drive her to an apartment complex where she had arranged to meet defendant. N.T. knew defendant through her boyfriend, who at the time, was incarcerated. N.T. and defendant decided to get some alcohol. They went to a CVS store where defendant stole two bottles of vodka.

N.T. and defendant returned to the apartment complex and met up with a group of about six of defendant's friends. The group went to a pond and nearby dumpster next to one of the buildings in the apartment complex and began drinking the vodka, passing a bottle around. N.T. testified that

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she initially took a couple of shots from the bottle and then passed it on, and when it came back to her, she took a few more shots than she had previously taken, until she finally "just started chugging it." N.T. claimed she drank "[a] large amount" of vodka.

N.T. testified that she was "feeling good," but then started feeling like she could not stand. She felt her body slide down the side of a dumpster she had been standing near. N.T. remembered closing her eyes, but claimed she could not recollect anything that happened afterward, until she awakened in the hospital.

N.T. was taken to the hospital by ambulance and was admitted overnight for observation. Hospital staff performed a sexual assault kit on her. N.T. discovered that she had the sexually transmitted disease, chlamydia. N.T. recalled speaking with two nurses, and told them that she could not remember if anyone had sexual intercourse with her.

At the time of her testimony, N.T. still did not know if defendant had intercourse with her. N.T. added that she never dated defendant, never hugged or kissed him, never spoke to him about having sex, and did not consent to having sex with him on the evening of the incident.

The parties stipulated that if called to testify, Dr. Vern Kerchberger, Jr., would testify that he is a medical doctor and that he treated N.T. in the hospital emergency room on May 6, 2009. N.T. was brought to the hospital by ambulance and when she arrived, she was covered in vomit and was intoxicated, with a blood alcohol content of 1.18. N.T. was crying and repeatedly said, "[p]lease don't rape me." A sexual assault kit was completed and given to the police.

State witness, Adan Fragoso, was employed as a maintenance monitor at the apartment complex where the incident occurred. The apartment complex, the Mount Shire apartments, sits on

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the border of Arlington Heights and Mount Prospect, with a part of the complex located in each municipality. Fragoso testified that on May 6, 2009, at about 7:00 p.m., he was making his rounds when he saw a group of about eight to ten teenagers drinking by a dumpster near the Arlington Heights properties. Fragoso contacted the Arlington Heights police and reported underage drinking.

While Fragoso waited for the police to arrive, some of the individuals in the group left. When an Arlington Heights squad car showed up, only four persons out of the group were left: a white female and three African-American males, one of whom Fragoso identified as defendant.

The Arlington Heights squad car approached the group, which was walking toward a parking lot. The officer remained in his squad car while he spoke to the group for less than a minute before driving away. Fragoso testified that after the squad car left, he saw the group head toward the Mount Prospect properties. Fragoso noticed that the girl had her arm around defendant and her head was down and her eyes were almost closed. The girl had trouble walking and it appeared as if all of her weight rested on defendant and it looked like she would fall if he had not been holding her up.

When the group reached the Mount Prospect apartment building, Fragoso observed one of the males open the door with a key. Defendant was holding the female by her arms while the other two males held her legs and carried her down about five or six steps into the apartment building. Fragoso followed them into the building. He then saw the males carry the female into a storage room and saw the storage-room door close. Fragoso called 911 and reported what he had observed.

The Mount Prospect police arrived within about five minutes of the 911 call. Fragoso gave police a key and directed them to the storage room. A few minutes later, Fragoso saw the police escort three males out of the building in handcuffs. Defendant was identified as one of the three

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males.

Mount Prospect police officer Daniel Kidd testified that on May 6, 2009, at approximately 7:35 p.m., he and his partner Officer Joseph Kanupke, were dispatched to a Mount Prospect apartment building in response to a 911 call. After speaking with Fragoso, Officer Kidd and his partner proceeded to the storage room. Officer Kidd heard mumbling and muffled noises before he unlocked the storage-room door with a key provided by Fragoso. The officer felt some resistance on the door when he attempted to open it, so he pushed on the door.

When Officer Kidd pushed open the door, he saw two males, later identified as Delvin Manavong and Tony Grimes.¹ The officer also observed a female lying on the floor right next to the door and surmised that the female's body had blocked the door from opening.

After Officer Kidd announced his office, Manavong and Grimes attempted to run away, but were apprehended. The officer testified that the female was lying face-down on the floor and she was naked from the waist down and appeared to be unconscious. Her underwear was on the floor and there was vomit on the floor as well.

Officer Kidd heard his partner yell at someone else to stop and then noticed a third male attempting to flee. By this time, the female who had been lying on the floor became conscious and threw up. She started crying and stated, "I told them to stop," and began repeating, "they tried to rape me." Officer Kidd testified that the female stated, "I told them to stop," or "I told them no." Officer Kidd called for an ambulance and the female was taken to the hospital.

¹ Manavong and Grimes were not charged in relation to this crime. Tony Grimes also appears in the record as Tony Grice.

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Officer Kanupke testified that he followed Officer Kidd into the storage room. A female was lying face-down on the floor near the door and she was naked from the waist down. Defendant came out from behind the door. His pants were around his ankles, his underwear was on his thighs and he was trying to pull them up while running out of the storage room.

After a brief chase, Officer Kanupke apprehended defendant and placed him in custody. As defendant was being handcuffed, he told Officer Kanupke "it was consensual." The officer responded, "[w]ith who, with the unconscious girl?" and then advised defendant not to speak anymore.

Police Officer Chris Rondeau was an evidence technician assigned to assist Officers Kidd and Kanupke. Officer Rondeau testified that when he went to the storage room he saw a young girl lying on the floor, naked from the waist down. The girl was mumbling incoherently and there was vomit next to her head. Officer Rondeau testified that the girl appeared to be going in and out of consciousness.

After helping secure the suspects, Officer Rondeau went to the Arlington Heights side of the apartment complex where he found two bottles of vodka in a dumpster and an empty package of condoms on the ground. The officer returned to the storage room where he saw a pair of woman's underwear, a gray t-shirt, a purple and gray hooded sweatshirt, and a pair of Addidas sandals. Officer Rondeau did not find any used or unused condoms in the storage room, nor did he see any blood, semen, or pubic hair on the floor. The officer added that the victim's clothes were not ripped, torn, or damaged and he did not see any blood or semen stains on the clothing in the storage room.

The parties stipulated that if called to testify, Kenan Hasanbegovic would testify that he is

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a forensic scientist with the Illinois State Police and that he received N.T.'s sexual assault kit. The kit contained vaginal, oral, and rectal swabs. No semen was detected on these swabs. Hasanbegovic also found no semen on the clothing items recovered from the storage room. He examined the vaginal swab and a swab of the victim's neck for the presence of saliva and both were inconclusive.

The parties also stipulated that if called to testify, Meredith Misker would testify that she is a forensic scientist with the Illinois State Police. Misker would testify that she extracted DNA from a swab of the victim's neck and determined within a reasonable degree of scientific certainty that based on the proportion of male and female DNA present, that this sample be preserved for further testing using Y-Chromosome STR DNA analysis.

The parties further stipulated that if called to testify, Jaclyn Garfinkle would testify that she is a forensic scientist with the Illinois State Police. Garfinkle would testify that she conducted Y-Chromosome STR DNA analysis on the DNA extracted from the victim's vaginal swab and determined within a reasonable degree of scientific certainty that no Y-STR profile could be identified from the swab. Garfinkle also conducted Y-Chromosome STR DNA analysis on DNA extracted from the swab of the victim's neck and identified a mixture of DNA profiles originating from two males. Garfinkle determined that a major Y-STR DNA profile was identified from the swab of the victim's neck that matched defendant's DNA profile.

Detective Lee Schaps of the Mount Prospect Police Department testified that he spoke with defendant at the police station on May 6, 2009, and advised him of his *Miranda* rights. Defendant signed a *Miranda* acknowledgment form and agreed to speak with the detective and his partner.²

² The record reveals that defendant filed a pretrial motion to suppress his post-arrest

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Defendant gave an oral statement but refused to give a written statement. Defendant's oral statement was not taped or memorialized in any manner.

According to defendant's oral statement, he received a text message from N.T. asking to meet up so they could discuss how to get her boyfriend out of jail. They met at the apartment complex in Arlington Heights and then walked to a local CVS where defendant stole two bottles of vodka while N.T. waited outside. Defendant and N.T. walked back to the apartment complex where they met a group of defendant's friends, including Manavong and Grimes.

Defendant brought out one of the bottles of vodka, took a drink from it, and then began passing it around the group. After the first bottle was finished, defendant decided that he wanted to have sex with N.T. Defendant brought out the second bottle of vodka and they continued to drink.

Defendant recounted that he, Manavong, and Grimes agreed to "roll" N.T., meaning they all agreed to have sex with her. Defendant asked an unnamed person for some condoms and obtained a condom for himself and one for Grimes, and then discarded the condom package in the grass near the pond.

After the group broke up, defendant, Manavong, and Grimes decided to walk over to Grimes' apartment building located on the Mount Prospect side. Defendant, Manavong, Grimes, and N.T.,

statement on the grounds that he did not knowingly waive his *Miranda* rights because of "diminished mental capacity." Defendant was referred to forensic clinical services for a determination of his mental capacity to understand *Miranda* and a report was issued indicating that he was capable of understanding the *Miranda* warnings. Defendant subsequently withdrew the motion to suppress because "[a]fter very extensive investigation, the basis was diminished."

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started walking toward the building. N.T. was so drunk she could not walk on her own, so Grimes carried her on his back until she got too heavy for him to carry. Defendant then carried N.T. "underneath her arms." When the group reached the stairs to the apartment building, defendant held N.T. under her armpits while Manavong and Grimes each held one of her feet and they carried N.T. down the stairs and into the apartment building. Defendant walked N.T. to a storage locker room. All four went inside and Grimes shut and locked the door to the storage room.

Defendant began kissing N.T., and while he was kissing her, he removed her pants and underwear. N.T. was lying on her back on the floor. Defendant pulled his pants down just enough to remove his penis from his underwear. He laid down in between N.T.'s legs and inserted his penis into her vagina and had intercourse with her. Grimes and Manavong stood nearby with their exposed penises in their hands, masturbating. After a short time, defendant turned N.T. over onto her knees and had sexual intercourse with her from a behind position. Defendant stated that he did not ejaculate during the intercourse and he did not say he was wearing a condom.

When defendant heard the police trying to push open the door to the storage room, he got off of N.T. and hid behind the door while attempting to pull up his pants. A police officer saw him and he attempted to flee but was apprehended after a brief chase.

After he gave his oral statement, defendant asked to see his mother and was permitted to speak to her in Detective Schaps' presence. Defendant related a similar version of events to his mother, said he made a mistake, and admitted that he had intercourse with N.T. even though he knew he should not have done so.

The State rested, and the trial court denied defendant's motion for a directed verdict.

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Defendant rested without presenting any evidence. The trial court found defendant guilty of criminal sexual assault under section 12-13(a)(2) of the Code for committing an act of sexual penetration with a person whom he knew was unable to give knowing consent to such an act. 720 ILCS 5/12-13(a)(2) (West 2008). The trial court also found defendant guilty of criminal sexual assault under section 12-13(a)(1) of the Code, for committing an act of sexual penetration with a person by the use of force or threat of force. 720 ILCS 5/12-13(a)(1) (West 2008).³

ANALYSIS

On appeal, defendant first contends that the evidence was insufficient to prove him guilty of criminal sexual assault under section 12-13(a)(2) of the Code. A reviewing court will not set aside a criminal conviction on the ground of insufficient evidence unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of guilt. *People v. Byron*, 164 Ill. 2d 279, 299 (1995).

When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 169 Ill. 2d 132, 152 (1996). A person commits the offense of criminal sexual assault under section 12-13(a)(2) of the Code, when he commits an act of sexual penetration upon an individual whom he knew was unable to understand the nature of the act or was unable to give knowing consent to such an act. This section of the Code applies to situations where an otherwise normally competent person is rendered temporarily unable to give knowing consent. *People v.*

³ Defendant raises no challenges to his conviction under section 12-13(a)(1) of the Code.

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Fisher, 281 Ill. App. 3d 395, 403 (1996).

"The legislature has indicated that there are two different ways to commit the crime. The first is knowingly to have sexual relations with someone who is unable to understand the nature of the act. The second is knowingly to have sexual relations with someone who, for any reason, is unable to give knowing consent." *Id.* In the instant case, we find there was sufficient evidence for a rational trier of fact, in this case the trial court, to find beyond a reasonable doubt that the defendant committed an act of criminal sexual assault under the second category.

The evidence established that just prior to the incident, N.T. consumed such an excessive amount of alcohol that she was rendered semi-conscious to the point where she could not walk on her own and subsequently became unconscious lying in a pool of her own vomit. Minutes before the incident occurred, N.T. was unable to walk on her own and had to be carried into the apartment building and down the stairs by defendant and his cohorts.

Evidence was also presented indicating that N.T. was unable to move even when her body blocked the door to the storage room that the police were forcibly trying to open. Officer Kidd testified that when he attempted to open the storage-room door, he felt some resistance on the door, so he pushed on the door. When the officer finally opened the door, he observed a female lying on the floor next to the door and surmised that the female's body had blocked the door from opening. The female was lying face-down on the floor. She was naked from the waist down, appeared to be unconscious, and there was vomit on the floor.

When N.T. arrived at the hospital, she was covered in vomit and hours later, her blood-alcohol concentration was 1.18, more than two times over the legal limit for operating a motor

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vehicle. Viewing all of this evidence in the light most favorable to the State, we find that there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that N.T. was rendered incapable of consenting to sexual intercourse with the defendant and that defendant knew she was unable to consent to such an act.

Defendant claims that the record is unclear as to the true extent of the victim's intoxication because her "true" blood-alcohol level at the time of the offense is unknown. We do not believe that this factor weighs in defendant's favor since it is reasonable to assume that the victim's blood-alcohol concentration would have been higher nearer the time of the offense than it was at the time the blood sample was taken hours later due to the dissipation of alcohol concentration in the blood over time.

Defendant also contends that the State failed to present evidence demonstrating that he knew the victim was unable to consent. We must disagree. In cases where it is alleged that the victim was too intoxicated to consent, the question for the trier of fact is the reasonableness of the defendant's belief that the victim consented to sex. *Fisher*, 281 Ill. App. 3d at 402.

In this case, defendant knew the victim was highly intoxicated. Evidence indicated that minutes before the sexual encounter, N.T. was rendered unconscious or at least semi-conscious after consuming a large quantity of alcohol with defendant and his friends. Evidence was also presented showing that when the police arrived on the scene and interrupted the sexual assault, N.T. was found unconscious lying in her own vomit, while defendant hid behind the door. Therefore, we find that the State met its burden of proof that defendant knew that N.T. was unable to consent to having sex with him. See *Fisher*, 281 Ill. App. 3d at 403 (where the victim was rendered unconscious after consuming an excessive amount of alcohol it was reasonable for the fact finder to conclude that the

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State met its burden of proof that the accused knew the victim was unable to give knowing consent to sexual encounter).

Defendant next contends that his conviction for criminal sexual assault should be reversed because the only evidence of sexual penetration came from his uncorroborated post-arrest oral statement and therefore the State failed to establish the *corpus delicti* of the crime. Again, we must disagree.

Under Illinois law, proof of an offense requires proof of two distinct propositions or facts beyond a reasonable doubt: (1) that a crime occurred, *i.e.*, the *corpus delicti*; and (2) that the crime was committed by the person charged. *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). Because of an historical mistrust of extrajudicial confessions, proof of the *corpus delicti* may not rest exclusively on a defendant's extrajudicial confession, admission, or other statement. *People v. Furby*, 138 Ill. 2d 434, 447 (1990).

Where a defendant's confession is part of the proof of the *corpus delicti*, the State must also adduce corroborating evidence independent of the defendant's statement. *Sargent*, 239 Ill. 2d at 183. However, the independent corroborating evidence need not, by itself, prove the existence of the crime beyond a reasonable doubt. If the defendant's confession is corroborated, the corroborating evidence may be considered together with the confession in determining whether the *corpus delicti* was proven beyond a reasonable doubt. *Id.*

In the instant case, there was ample evidence, independent of defendant's confession, tending to establish that a criminal sexual assault occurred and that defendant was the person who committed the offense. The evidence shows that when Officers Kidd and Kanupke entered the storage room,

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they observed the female victim lying face-down on the floor. She was naked from the waist down and appeared to be unconscious.

The officers also observed defendant a few feet away from the victim, hiding behind a door, with his pants around his ankles and his underwear around his thighs. Moreover, a swab of the victim's neck contained DNA matching defendant's DNA profile. All of this evidence independently corroborates defendant's description of the sexual assault set forth in his post-arrest statement to police.

Defendant finally contends that the Illinois Department of Corrections (IDOC) exceeded its authority and improperly sentenced him to an indeterminate term of mandatory supervised release (MSR). Defendant argues that the IDOC has no authority to sentence him to an MSR term, and since he was not sentenced to such a term by the trial court, the imposition of an indeterminate MSR term is void. This argument was recently rejected by our supreme court in *People v. Rinehart*, 2012 IL 111719 (2012), which forecloses this claim before us.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.